STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY, Plaintiff-Appellee,	UNPUBLISHED September 30, 2014
v	No. 313588 Wayne Circuit Court
FRANK J. WOLICKI, ANTHONY A. DIGIROLAMO, KENNETH M. LEONARD and ADAMS/PARK INVESTMENTS, L.L.C., Defendants-Appellants.	LC No. 11-012727-CK

Before: DONOFRIO, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal by right the order granting plaintiff's motion for attorney fees and sanctions. We affirm.

This case arises out defendants' breach of a loan agreement under which plaintiff disbursed a $200,000 loan to defendants for the opening of a pizza restaurant in Detroit. Plaintiff filed the suit in Wayne Circuit Court, and defendants moved to transfer the case to Macomb Circuit Court, arguing that defendant, Adams/Park Investments, L.L.C. ("Adams/Park"), never opened the restaurant in Detroit as planned, and that Adams/Park and the individual defendants each lacked sufficient ties to Wayne County to defend plaintiff's lawsuit there. Defendants' motion merely cited the venue statute, and an accompanying brief was not filed. Plaintiff opposed the motion with extensive documentary evidence, including the contractual agreements, and requested sanctions pursuant to MCR 2.114. The trial court denied the motion for change of venue, but did not rule on the motion for sanctions. Plaintiff filed a motion for summary disposition and renewed its request for sanctions for the refusal to withdraw the motion for change of venue. The trial court granted both motions. Defendants' motion for reconsideration of the order granting sanctions was denied.

Defendants first argue that the trial court clearly erred when it granted plaintiff's motion for attorney fees and sanctions premised on defendants' motion for change of venue. We disagree.

"We review for clear error the trial court's determination whether to impose sanctions under MCR 2.114." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). Clear

error occurs when, "after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made." *Jackson-Rabon v State Employees Retirement Sys*, 266 Mich App 118, 119-120; 698 NW2d 157 (2005).

MCR 2.114(D) provides that the signature of an attorney or party constitutes the signer's certification that

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
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> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

See also *Vittiglio v Vittiglio*, 297 Mich App 391, 406; 824 NW2d 591 (2012) (quoting MCR 2.114(D)). If a document is signed in violation of MCR 2.114(D), the trial court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(E); *Vittiglio*, 297 Mich App at 406-407. The trial court found that it was "clear that there were other motives for taking the actions that were taken" by defendants, the motion for change of venue was "baseless," and granted the motion for sanctions in the amount of $8,400 against defendants and defendants' attorney.

Michigan's venue statute provides, in part, that "[t]he county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action." MCL 600.1621(a); *Angelucci v Dart Props, Inc*, 301 Mich App 209, 213 n 2; 836 NW2d 219 (2013). The parties agree that defendants intended to open a pizza restaurant in Detroit. Defendants claim that the business "never became a viable business entity, as [defendant Adams/Park] was locked out of the Kales Building before [the restaurant] ever opened for business." Defendants claim this fact supports their argument that, because the restaurant did not open, defendant Adams/Park did not "conduct[] business" for purposes of the venue statute. Defendant Adams/Park provided a Detroit address, 76 West Adams Street, to the Department of Licensing and Regulatory Affairs as its "registered office address," and a 2009 annual statement indicated that defendant Adams/Park's resident agent was defendant Leonard, who listed the Adams Street address, and that defendant Adams/Park's registered office was the same Adams Street address. The plain language of MCL 600.1621(a) does not distinguish between viable businesses and nonviable ones, and defendant failed to cite any authority in support of this position. In any case, the claim that defendant Adams/Park had not opened the pizza restaurant only addressed the question whether defendant Adams/Park "conduct[ed] business"; it did not address the fact that defendant had a place of business and a registered office in Wayne County, each of which was sufficient to establish venue.

Defendants' motion for change of venue also failed to "state with particularity the grounds and authority on which it [was] based," MCR 2.119(A)(1)(b), and was not "accompanied by a brief citing the authority on which it [was] based," MCR 2.119(A)(2). Instead, the motion claimed that venue was proper in Macomb Circuit Court because the individual defendants each lived in Macomb County. However, because the residence or business ties of only one defendant are sufficient to render venue appropriate, MCL 600.1621(a),[1] the residences of the individual defendants are irrelevant since defendant Adams/Park's ties to Wayne County were sufficient to render venue proper against all four defendants. Defendant Adams/Park has a place of business and a registered office in Wayne County, as indicated on documentation filed with the Department of Licensing and Regulatory Affairs, which is sufficient, under MCL 600.1621(a), to establish venue. Contrary to the implication of defendants' brief on appeal, the motion for change of venue did not raise a forum non conveniens argument.

The trial court did not clearly err when it granted plaintiff's motion for attorney fees and sanctions in light of defendants' motion for change of venue. Plaintiff's suggestion that defendants' motion was "filed for the improper purpose of delaying litigation" appears correct in light of the fact that plaintiff's motion for summary disposition of its breach-of-contract claim was granted, with defendants raising only the meritless[2] defense of supervening impossibility based on the actions of unnamed "third parties." While defendants devoted only one paragraph to opposing plaintiff's motion for summary disposition,[3] they responded to the motion for attorney fees and sanctions, within the same document, in five pages. Defendants' lack of defenses to plaintiff's breach-of-contract claim belies their assertion that judicial economy would have been served by transferring the case to Macomb Circuit Court and suggests that the motion for change of venue was filed to needlessly delay the progress of the case. Accordingly, the trial

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[1] Venue is proper in "[t]he county in which *a defendant* resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action." MCL 600.1621(a) (emphasis added). "'The' and 'a' have different meanings. 'The' is defined as . . . definite article . . . a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article ['a['] or ['a]n.[']]" *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000) (further citation omitted).

[2] "A promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73-74; 737 NW2d 332 (2007). "The question whether a promisor's liability is extinguished in the event his contractual promise becomes objectively impossible to perform may depend upon whether the supervening event producing impossibility was or was not reasonably foreseeable when he entered into the contract." *Id.* at 74 (further citation omitted). Even assuming that it was impossible for defendants to fulfill the loan agreement, the failure of a restaurant business was reasonably foreseeable when the agreement was executed.

[3] We also note that defendants did not challenge the order granting summary disposition in favor of plaintiff in this appeal.

court was justified in finding that defendants' motion for change of venue violated MCR 2.114(D)(2) (document not warranted by existing law) and (D)(3) (document filed for improper purpose), and we cannot conclude that the trial court clearly erred. *Guerrero*, 280 Mich App at 677.

Defendants next argue that the trial court abused its discretion when it granted plaintiff's motion for attorney fees and sanctions in the full amount requested, without first determining the reasonableness of the fees at an evidentiary hearing. We disagree.

For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Because defendants first raised this issue in their motion for reconsideration, it is not preserved for appellate review.[4] When preserved, this Court reviews the amount of an attorney-fee award, *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008), and the amount of an award of sanctions, *Vittiglio*, 297 Mich App at 408, for an abuse of discretion. However, because this issue is unpreserved, review is "limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Under this standard, relief may be granted if "(1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

The sanctions authorized by MCR 2.114(E) include "reasonable attorney fees." *Vittiglio*, 297 Mich App at 406-407. "[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith*, 481 Mich at 528-529. Additionally, the personal guaranties signed by each of the individual defendants provided that, "in the event this Guaranty is placed in the hands of an attorney for enforcement, the Guarantor will reimburse [plaintiff] for all expenses incurred, including actual attorneys [sic] fees." Thus, while the individual defendants waived any challenge to the reasonableness of the attorney-fee award by agreeing to pay plaintiff's "actual" fees in the event of a lawsuit, defendants' counsel—who was found jointly and severally responsible for the same award as defendants, but through the mechanism of sanctions rather than attorney fees—made no such waiver.

However, defendants' attorney forfeited the issue of the reasonableness of the sanctions award by failing to request an evidentiary hearing in the trial court. This Court addressed similar facts in *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002), in which the trial court awarded the defendant "fees related to experts used in preparation for trial," under MCL 600.2164, and "expert[-]deposition fees pursuant to MCR 2.302(B)(4)(c)(*i*) and (*ii*)." The

[4] Defendants' brief on appeal repeats their argument, first raised in their motion for reconsideration and thus unpreserved for appellate review, that the trial court did not order that the sanctions award would be joint and several. At the hearing on defendants' objections to plaintiff's proposed order, which contained the contested provision, the court stated, "[T]he order that [p]laintiff has submitted accurately and correctly states the ruling of the [c]ourt."

plaintiffs argued on appeal that "the trial court erred in awarding costs to [the] defendant because [the] defendant's bill of costs was not sufficiently detailed and because the trial court failed to hold an evidentiary hearing to resolve ambiguity resulting from the lack of specificity." *Id*. Analogizing the defendant's motion for costs to case law on attorney fees, this Court held:

> Our review of the record and the trial briefs submitted establishes that [the] plaintiffs did not request an evidentiary hearing until they moved that the trial court reconsider its opinion and order. [The p]laintiffs' failure to request an evidentiary hearing constituted a forfeiture of the issue. However, even if the issue had not been forfeited, [the] defendant's bill of costs and accompanying documentation provided the trial court with a reasonable evidentiary basis to evaluate and decide [the] defendant's motion for costs. Thus, the trial court did not abuse its discretion by deciding the motion solely on the pleadings and supporting documentation submitted by the parties. [*Id.* at 691-692 (internal citations omitted).]

In this case, as in *Kernen*, defendants first requested a hearing on the reasonableness of the award of attorney fees and sanctions in their motion for reconsideration. Also similar to the facts of *Kernen*, plaintiff adequately supported its motion for attorney fees and sanctions with an affidavit of one of its attorneys, a copy of the 2010 State Bar of Michigan Economics of Law Practice report, and an itemized invoice that detailed 49.3 hours of work, all of which appeared to be related to either responding to defendants' motion for change of venue or drafting plaintiff's motion for summary disposition and motion for attorney fees and sanctions, which were filed concurrently in the same document. Even when a party challenges the reasonableness of attorney fees, an evidentiary hearing is not required "if the parties created a sufficient record to review the issue . . . ." *Kernen*, 252 Mich App at 691. Given that the reasonableness of the attorney-fee and sanction award was not challenged in the trial court, the record of plaintiff's attorney fees was sufficient to obviate the need for an evidentiary hearing. Because review of the record reveals no "clear or obvious" error, *Duray Dev, LLC*, 288 Mich App at 150, the trial court did not plainly err in awarding plaintiff the full amount of requested fees.

Affirmed.

/s/ Pat M. Donofrio
/s/ /Kirsten Frank Kelly
/s/ Karen M. Fort Hood